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No. 06-1038

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In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE MICHIGAN INTERSCHOLASTIC ATHLETIC ADMINISTRATORS ASSOCIATION IN SUPPORT OF PETITIONER

ALLEN S. BUSH
Counsel of Record
ALLEN S. BUSH, P.C.
2607 EAST CROWN DRIVE
TRAVERSE CITY, MI 49684
(231) 929-7620

Attorney for Amicus Curiae Michigan Interscholastic Athletic Administrators Association

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF THE AMICUS

The Michigan Interscholastic Athletic Administrators Association (MIAAA) is a Michigan not-for-profit corporation composed of more than 700 members, who are athletic administrators in the public and private schools of Michigan. The members of the MIAAA are generally charged with the day to day administration of the athletic programs of their respective schools. They are in charge of scheduling contests and facilities, hiring and evaluating coaches and workers, and insuring compliance with all of the rules and regulations of their school district, their leagues, and the Michigan High School Athletic Association as the rules would pertain to the entire interscholastic athletic program. Because of the profound effect of the consequences of the lower Court's rulings upon the day to day activities of the members and the programs they administer, the MIAAA is filing this brief in support of the Petitioner. The parties were asked to consent to the filing of this brief and both parties have consented.[1]

SUMMARY OF ARGUMENT

Michigan has produced an exemplary athletic program for males and females for more than the past three decades. Utilizing any system of measurement, whether it be the number of participants in athletic programs, the number of tournament sports offered, or the number of student athletes who have gone on to higher levels of athletic competition,

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[1] Counsel for the parties of this case did not author this brief in whole or in part. No person or entity, other than the amicus curiae MIAAA, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

Michigan has exceeded the per capita ratios of all but the most populated states.

The District Court and the 6th Circuit Court of Appeals both wrongfully decided that the setting of schedules for athletic seasons in Michigan, in authorized single-sex programs, was a facial gender classification sufficient to presume animus and thereby shift the burden of proof away from the plaintiff and onto the Michigan High School Athletic Association (hereinafter, the MHSAA). Despite undisputed evidence that the programs for female athletes had succeeded in creating participation opportunities greater than the national norm, the MHSAA was left with the presumption that it and its member schools had discriminated to the detriment of certain elite female athletes.

Of equal, or even greater moment, is the standard that the Sixth Circuit has made the law of the Circuit for the administration of school athletic programs. If every difference in permissible single sex programs is sufficient to raise a constitutional question, then a veritable flood of litigation will arise from routine decisions that might be questioned by disgruntled parents or athletes. The ultimate result will be to reduce all athletic teams to a single team per sport per school and to revert to a time of limited athletic opportunity for fewer students, especially females.

This amicus urges the Court to contemplate the better alternative. Particular differences in athletic programs should only be unconstitutional if a plaintiff can prove that there has been intentional discrimination resulting in harm to that plaintiff. Title IX should provide the exclusive remedy for all claims of gender bias in athletic programs, so that all of the concerns of the athletic program and its administration are

considered within the totality of the programs, not in the piecemeal fashion of individual lawsuits.

REASONS FOR GRANTING THE WRIT

In 1966, Lansing Sexton High School, a large urban high school located in the capitol city of Michigan, offered an athletic program consisting of nine varsity sports; all male (females could try out, but few did and very few made the teams). There was one basketball team, one swimming team, one track team, one cross-country team, one wrestling team, one golf team, one tennis team, one baseball team, and one football team. The coaching staff consisted of a dozen male coaches. The school had one gymnasium and the athletic director was the boys' physical education teacher/wrestling coach, who was given one hour of release time to administer the athletic program.

In 2004-5, Lansing Sexton High School still had one gymnasium, but offered twenty varsity sports; ten male and ten female. There was still one football, baseball, and wrestling team, but there were two of every other sport, except volleyball and softball, which were exclusively reserved for females. The coaching staff had more than 30 coaches, nearly evenly divided by gender. There was a building athletic director with the full time job of administering the athletic program for the school and a district-wide athletic director to coordinate the programs among the various high schools and junior high schools in the city. Female participation has more than doubled the number

of athletes and athletic opportunities from the program of the forty years ago.[2]

The Sexton example has been replicated, to some degree, throughout the state of Michigan in every school district, public and private. The massive growth in athletic opportunities has evolved by a judicious use of facilities, the development of feeder programs in the lower grades, a nurturing of single sex programs, and a commitment to provide quality educational-athletic experiences for all of the young people of the state, regardless of gender.

The principle reason for the prodigious increase in athletic teams and participation opportunities was the enactment of Title IX, 20 USCS 1681-1688. The statue, coupled with the explosion of media coverage of all athletic activities in our society, has created a public demand for more varsity sports.

The MIAAA would urge this Court to accept the preemption of all claims related to gender equity in the schools by Title IX. Every issue related to gender and school athletics is monitored by the Office of Civil Rights, so that there is a forum for every perceived inequity, no matter how minute or trivial the issue. Title IX provides a comprehensive system for monitoring, administering and adjudicating the issues of gender equity in high school athletics. This amicus would also urge this Court to resolve the conflict among the Circuits as to the proper test to be applied to facially neutral decisions that affect permissible single-sex teams and to clearly delineate a requirement for individual claimants that

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[2] Interview with Melanie Miller, athletic director, ret. J.W. Sexton H.S., Lansing, MI, April, 2005.

they must prove intentional discrimination in order to prevail on a claim.

All of plaintiff/appellee's claims and all of the opinions of the Courts below rest upon an incorrect conclusion; that the female athletes of Michigan are disadvantaged by the placement on the calendar of the currently scheduled athletic seasons. The data that has been compiled, in the time between the appeal, remand, rehearing and this petition, conclusively demonstrates that the Michigan model of athletic seasons has been more successful in creating and maintaining athletic opportunities for female students than the plaintiff's model. Therefore, an analysis of the real intent of the MHSAA and its member schools, with an eye to the total athletic program for females in the state, reflects that those programs have been a resounding success in terms of opportunities for female athletes and contradicts the opposite conclusion of the preceding Courts with their presumption of discriminatory animus.

PARTICIPATION AND OPPORTUNITY

Michigan, utilizing its model for seasons, has continued to reflect higher participation numbers for all of its sports offerings and especially for female sports.[3] Michigan ranks eighth in the nation for total population of boys and girls ages 14-17, but has participation rates that place it fifth highest in the nation in all sports offerings.[4] In the 2005-2006 school year, more than 20,000 Michigan girls played high school

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[3] MHSAA News, June 8, 2005.

[4] 2005-2006 National Federation of State High School Athletic Associations' Athletic Participation Survey.

basketball and more than 21,000 Michigan girls played high school volleyball. (Winter volleyball was the most popular female sport).[5] We believe that these statistics are directly related to the quality of the experience and to the use of the Michigan model of sports seasons. Michigan provides 14 tournament sports seasons for exclusive female participation and provides 14 tournament seasons for males. Also, it is important to note the fact that females are not excluded from participating on the "boys" team if their school does not offer the same sport for females, while males are excluded from participating on "girls" teams under the same circumstances. This important fact was not recognized in the Courts below when they evaluated the 'disadvantage' to females from the current scheduling system. There is certainly no evidence of discrimination against females in the provision of athletic seasons, the quantity or quality of the athletic programs or the sheer number of opportunities presented for females to participate in athletics in Michigan.

In states that 'voluntarily' switched their girls' basketball and volleyball seasons, many of whom were motivated by the desire to avoid protracted litigation similar to this case, the results have been ominous. The National Federation of High School Athletic Associations has reported the following: North Dakota reported a decline of 10.6% in girls' basketball participation and a 7% drop in volleyball participation; South Dakota, within two years of the change, dropped 13.1% in girls' basketball; Montana, within two years of the change, dropped 10.9% in girls' basketball and 8.1% in girls' volleyball; and in West Virginia, since the change was made in 1985-86, the number of girls and boys playing basketball

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[5] 4. Ibid.

has dropped 19.4% and 27.4%, respectively.[6] The decline in participation in those states can only be blamed on one factor, the change in seasons.

High school athletic participation in Michigan is a privilege, not a right. *Berschback v. Grosse Pointe Public School Dist.*, 154 Mich. App. 102, 397 N.W.2d 234, 1986 Mich. App. LEXIS 2841 (1986). The high school athlete must meet conditions precedent to even trying out for a high school team. They must be enrolled in their high school. They must pass a physical examination. They must attain and maintain certain academic standards. They must agree to abide by an athletic code of social and behavioral conduct, in addition to the general student code of conduct. These conditions are what distinguish the educational-athletic experience of the MHSAA member schools from the private sports world of the AAU (Amateur Athletic Union) or from the professional athletic leagues. Common sense tells us that if the programs for female athletes were rife with discrimination, or inferior to male programs, female athletes would not be willing to meet the conditions precedent to participation, let alone participate in record numbers. In Michigan, overall female participation in all tournament sports increased by 22% in 2004-5.[7]

ADMINISTRATION AND EQUALITY

Athletic directors and coaches must make thousands of decisions related to the operation of an athletic program.

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[6] Memorandum to Representative Council. Jack Roberts, Executive Director, Nov. 5, 2004.

[7] MHSAA News. June 8, 2005

They must allocate the use of finite facilities and budgets. They must make subjective decisions on a myriad of issues that make a student's athletic experience unique to the school, to the student, and to the time and the place of the experience. Because each student will have a unique experience, it is impossible for an athletic experience for boys and girls to be absolutely identical. Athletic programs cannot provide the same gym to each team in the same sport at the same time of day (especially if there is only one gymnasium for six different basketball squads), or the same coach with the same uniforms, practice plans and strategies. Under the holdings of the Sixth Circuit, each decision concerning a female athlete or female team that differs from the experience of a male athlete or male team could be considered 'disadvantageous' and subject to a presumption of discriminatory motive, which will compel the Athletic Director to demonstrate an exceedingly persuasive argument for the decision.

Aside from just selecting the date, time, and location of contests for boys' and girls' teams, Athletic Directors have to consider every detail of the athletic programs. Even assuming the uniforms and practice equipment can be purchased uniformly for all teams regardless of gender, the most likely areas of dissimilarity will occur with the issues which have been the most difficult to resolve under Title IX. These areas are the quality and availability of coaches and game personnel, the use of limited facilities, publicity, fundraising, and off-season activities.

Many small and rural school districts have used the same coaching staff for boys' and girls' teams. With the seasons being changed to run simultaneously, it is unlikely the staff can operate both programs. The selection and hiring of quality coaches, officials and game workers appears to have become a constitutional question if some individual takes issue

with whether the two programs were equally disadvantaged by the quality of the hirings related to their individual sport.

In the smaller high schools in the State of Michigan, it is rare to have access to more than one full-sized gymnasium. The scheduling of practice times and locations for various team levels (each basketball program customarily has three teams: a varsity, a junior varsity, and a freshmen team, per gender), whether in the high school or at smaller elementary gyms, would need to be precisely the same. It is impossible to replicate the precise practice times for each of the teams in the same facility. This would include auxiliary activities such as Saturday and Sunday open gyms, weight training, or water training activities, and all of the scouting functions, video player access and medical training rooms. It will be impossible to replicate the precise times of the day for each similarly situated team to utilize the limited facilities for an exclusive team activity. There is simply no exceedingly persuasive argument for having the girls' varsity start practice at 3 p.m. and the boys' start at 4 p.m., other than someone needs to go first.

One special facilities problem for older or smaller schools with one varsity locker room is the use of that space. Any school constructed before 1980 does not have a varsity locker room that accommodates females. If the choice is to reconstruct the building or have a single basketball team, the likely choice is the latter.

Publicity has been an area of concern for the Office of Civil Rights under Title IX for many years. The concept is not only the amount of media coverage but also the equal promotion of all of the teams. This concept includes the use of pep bands, cheerleaders, pep assemblies, and any other facet that contributes to the experience of the evening such as

concession stands, meet- the-team nights, parents' nights, and booster organizations. It is difficult for this author to conceive that having or not having a concession stand at a high school basketball game gives rise to a presumptive violation of the United States Constitution.

Fundraising for high school sports has become a major problem for athletic administrators. The school districts have not increased athletic budgets to match the huge growth in athletic programs, which is due, in large part, to the ever-growing interest of girls in athletics. It is most common for the schools to encourage the formation of booster clubs to provide supplemental funds for the programs. If the clubs are sport specific, their success tends to mirror the traditionally successful programs. If the club is a universal club, it supports all of the sports teams and is usually administered by the athletic director who allocates the funds to the teams. In either case, the athletic administrator cannot operate the programs without the booster funds, but it is likewise impossible to assure that each of the teams will receive precisely the same dollar amounts under either system. Whatever decision-making criteria are applied to the distribution of funds they will not be exceedingly persuasive if they are not exactly the same.

The list of potential discrepancies between the various male and female programs is endless. The athletic administrators are currently challenged to meet the 'essentially equivalent' standards applied by the Office of Civil Rights for Title IX compliance. In trying to balance the individual preferences of coaches, competing schools, the availability of scarce facilities, talented workers and game officials, the need to be exceedingly persuasive for all of the decisions that are made makes the separation of teams an impossible burden. The schools will always look for the

simplest and cheapest method to resolve their problems. In the instant case, to avoid endless litigation over trivial distinctions, the schools will either abandon athletics all together (an idea that would be politically unpopular) or resort to athletic teams open to all genders, thus, reversing thirty years of gender equity progress.

Schools are not in the litigation business. To avoid the inevitable litigation over facilities, staffing, and programs, they will reduce or eliminate single sex athletic programs. Any reduction in programs means a loss of participation opportunities for some girl or boy. Program reductions will undoubtedly fall hardest on the poorer school districts that tend to lack expansive and expensive facilities, smaller rural communities, and upon the less athletically talented children, because sub-varsity programs will be eliminated. Reduction in female participation will also, logically follow if the schools are compelled to return to a single team per any one sport. If only fifteen of the best athletes in the school are given the opportunity to play on the team, activities that reward the bigger, stronger, and faster people will be heavily male, due to physiology.

As previously noted, most Michigan school districts offer two or three teams of a particular sport, per gender, per season. There is a varsity team, a junior varsity team, and a freshman team (if the school has ninth graders in the high school and/or if the population of the school is large enough). Commonly, there is also a companion program reaching into the late elementary school age children of both genders in all of the sports, known as a feeder program. The feeder programs are also, usually, under the control and administration of the High School Athletic Director or Varsity coach.

If we use basketball as an example, each team at each level in the high school and junior high school generally has fifteen players. By eliminating just one of the sub-varsity programs for each gender, the school can alleviate some of the most common problems of scheduling gym usage, obtaining quality coaches, and in reducing the number of decisions that might give rise to a legal challenge. However, by eliminating a sub-varsity program some thirty children would not have a high school basketball experience. In the 2004-05 school year, seven hundred and twenty schools sponsored girls' basketball in the state of Michigan with 20,541 girls participating.[8] If just ten percent of the participation opportunities are lost due to the change of seasons in just the sport of basketball, more than two thousand females would not have a high school basketball opportunity. Logically, the same results will follow in all of the sports programs at issue in this case. From an educational standpoint, the loss of female athletic participation opportunities would be a serious and tragic loss.

Numerous studies reflect the value to society of the participation of young women in high school athletics. The studies demonstrate: higher self-esteem; lower use of alcohol, drugs, and tobacco; lower dropout rates; and fewer teen pregnancies.[9] It simply does not make any sense to apply legal standards that create a direct and deleterious effect upon the participation opportunities of female high school athletes. The rationale of a 'seasons plan' that increases or at least

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[8] 2004-2005 National Federation of State High School Athletic Associations' Athletic Participation Survey.

[9] Survey Resources: The Case for High School Activities, National Association of High School Athletic Associations, 2005.

maintains an athletic opportunity for females, surely, is more persuasive, then a plan that has been proven to destroy opportunities.

Additionally, the next group of plaintiffs, who represent the thousands of non-elite female athletes, will surely argue that the loss of athletic opportunity for the less talented female players is disadvantageous. Under the law of the 6th Circuit, that finding would create a presumption of discrimination. Surely, the arguments of the children who had lost their opportunity to participate at all will be as compelling as the findings below that some elite females have been disadvantaged by not being recruited by as many colleges or not being named to as many all-star teams. Can it really be a significant concern to the average female athlete, when the girls' high school basketball tournament is played, *if she has no team to play on?*

CONCLUSION

The decision of the District Court was wrong for many reasons, but principle among them, is that the District Court simply presumed a discriminatory purpose and did not weigh the advantages and disadvantages of the tournament seasons in light of the effect on athletic participation opportunities. The lower Courts merely compared single-sex teams of the same sport on only the aspect of scheduling the season and its state tournament. They erroneously concluded that certain seasons were disadvantageous. The ultimate conclusion of the Courts below was that the Association and thereby its member schools, had discriminated against the female athletes of the state. Despite repeated efforts to get the District Court to broaden its scope of analysis, it refused, as did the 6th Circuit on appeal and on re-hearing. At every step of the proceedings this amicus has asked the respective Courts to

consider the larger picture and to focus on the quintessential element of any athletic program; the opportunity to participate in a sport. We have consistently urged the adoption of the requirement that an individual plaintiff be compelled to prove intentional discrimination on the part of the decision-maker as an element of their case. The presumption of discriminatory animus with its requirement of providing an exceedingly persuasive reason by a preponderance of the evidence is too great a hurdle for the local athletic administrator to overcome in too many decisions in the day to day operation of single sex programs.

High School athletic programs are extensions of the classroom. They are not minor leagues for college or professional development. They are not entertainment athletics where the coaches and players are paid with lavish salaries or scholarships to participate. They are educational opportunities provided, in the overwhelming majority, to average children with average athletic talent. The ultimate effect of the decision of the 6th Circuit will be to destroy opportunities and to reverse the increases in female athletic participation that have been developed over the past thirty-four years. We urge this Court to accept the Petition of the MHSAA and to settle the law, consistent with the arguments and conclusions of the Defendant/Appellant, MHSAA.

Respectfully Submitted,

ALLEN S. BUSH P.C.

Allen S. Bush (P30283)
Counsel of Record
2607 East Crown Drive
Traverse City, MI 49684
(231) 929-7620

Counsel for Amicus Curiae
Michigan Scholastic Athletic
Administrators Association

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